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No. 89-1493

In the
Supreme Court of the United States
October Term, 1990

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

JOSEPH E. O'NEILL, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE FOR CONTINENTAL AIRLINES, INC. AND BRIEF AMICUS CURIAE FOR CONTINENTAL AIRLINES, INC. IN SUPPORT OF REVERSAL

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE FOR CONTINENTAL AIRLINES, INC.

Pursuant to Rule 37 of the Rules of this Court, Continental Airlines, Inc. respectfully moves for leave to file the attached brief amicus curiae in this case supporting reversal of the decision of the United States Court of Appeals for the Fifth Circuit. Counsel for petitioner Air Line Pilots Association, International has consented to the filing of this brief; counsel for respondents O'Neill Group has refused consent.

1. Although not a party to this lawsuit, Continental is a party to the settlement at issue, and has a direct and significant interest in preserving and defending the

settlement. The O'Neill Group has filed a separate action against Continental challenging the terms of the settlement.1/ Both Continental and its 4,000 incumbent pilots have relied upon the terms of this settlement for over five years; Continental has long since fulfilled its commitments on pilot promotions and distributed more than $17 million in severance pay to 366 pilots pursuant to the settlement. In addition, the settlement, which directly resolved over $2 billion in bankruptcy claims and established procedures for resolving millions more, was a critical part of Continental's reorganization plan, which was approved and became effective in 1986. Invalidation of any part of the settlement and any attempt to restore the status quo ante would be severely prejudicial to Continental and virtually impossible.

2. Both ALPA and the O'Neill Group are adversaries of Continental, and for tactical or institutional reasons neither has had an incentive to develop for this Court, or the courts below, all of the benefits that the strike settlement provided the striking pilots, or all of the weaknesses in ALPA's legal position opposing Continental's actions prior to the settlement. Continental seeks through this brief to provide the Court a more complete description of the facts and circumstances surrounding the negotiation and implementation of the settlement.

3. More generally, neither ALPA nor the O'Neill Group has any incentive to provide this Court with an employer's perspective on the issue presented. Although actions premised upon the duty of fair representation are brought by employees against unions, employers may be directly affected by the outcome of any such suits. Adoption of a standard for evaluating duty of fair representation claims

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1/ *O'Neill v. Continental Airlines, Inc.*, Civil Action No. 87-259 (S.D. Tex., filed January 26, 1987).

that unduly restricts a union's ability to act would undermine employers' confidence in unions' bargaining authority, and would make the negotiation and resolution of difficult strike and related issues less likely, if not impossible. Employers no less than unions have an interest in ensuring that collectively bargained agreements not be subject to second-guessing by disgruntled union members or by lay jurors invited to speculate under the ruling below.

CONCLUSION

For the foregoing reasons, Continental respectfully requests that the Court grant this motion for leave to file the attached brief amicus curiae supporting reversal.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR CONTINENTAL AIRLINES, INC. IN SUPPORT OF REVERSAL

INTERESTS OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Continental Airlines, Inc. submits this brief amicus curiae subject to the granting of the attached Motion For Leave To File A Brief Amicus Curiae.

The amicus supports reversal of the decision by the United States Court of Appeals for the Fifth Circuit. The interests of the amicus are stated in the attached Motion, and are not repeated here.

STATEMENT OF FACTS2/

A. Continental Files Bankruptcy In 1983; ALPA Commences A Bitter Two Year Strike

On September 24, 1983, Continental filed a petition for reorganization under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, *et seq.*, substantially curtailed its flight operations, rejected its collective bargaining agreement with ALPA, and established emergency work rules to govern its pilots until a new agreement could be negotiated.3/ CAL App. at A-1. On October 1, 1983, in response to Continental's rejection of its labor contract,

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2/ As a result of a protective order entered by the district court, Continental has not had access to the record in this case. The facts set forth herein are taken from final court decisions and from the Declaration of Donald Breeding filed in the Fifth Circuit with Continental's Motion To Intervene For Limited Purpose And Petition For Rehearing; a copy of the Breeding Declaration is included in the Appendix to this brief [hereinafter "CAL App."] at A-1. Continental's motion to intervene in the Fifth Circuit was denied. The settlement agreement is reproduced at Appendix 4 to ALPA's petition for certiorari [hereinafter "ALPA App."].

3/ Continental's filing of bankruptcy and its rejection of its collective bargaining agreements was the subject of extensive litigation in the bankruptcy court. *See, e.g., In re Continental Airlines, Inc.*, 38 Bankr. 67 (Bankr. S.D. Tex. 1984) (denying motion by unions to dismiss bankruptcy petitions as having been filed in bad faith); Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association Collective Bargaining Agreements, *In re Continental Airlines Corp.*, Consolidated Case No. 83-04019-H2-5 (Bankr. S.D. Tex. August 17, 1984) (authorizing rejection of collective bargaining agreement with ALPA). CAL App. at A-17.

ALPA commenced a strike against Continental. Id. at A-19.

ALPA's strike created a severe shortage of pilots and crippled Continental's remaining flight operations. In late November 1983, after undertaking substantial efforts to get striking pilots to return to work, Continental began hiring permanent replacement pilots. Id. at A-36. With the aid of the permanent replacements and a growing number of crossover pilots, Continental gradually rebuilt its operations. By August 1985, Continental employed approximately 1,600 active pilots, including over 400 former strikers who had abandoned ALPA's strike, and approximately 200 pilots who had elected not to strike. CAL App. at A-11.

The two-year ALPA strike at Continental was exceptionally hostile and bitter. There were repeated incidents of harassment of passengers and working pilots, including an incident for which two striking pilots were convicted of federal felony offenses for possession of unlawful explosive devices, apparently intended for use in pipe bombing the homes of certain working pilots. See *In re Continental Airlines Corp.*, 907 F.2d 1500, 1518 n.14 (5th Cir. 1990); CAL App. at A-4. Continental also obtained injunctions against ALPA and striking pilots for harassment of working employees and passengers and obstruction of airport access in Houston, Dallas, San Antonio, and San Diego. Id. at A-5. Other strike-related violence included telephone death threats, arson of a working pilot's barn and another's house, the release of noxious odor bombs in Continental terminals at the Houston and Denver airports, the jamming of aircraft communication systems, and hundreds of incidens of

vandalism to the property of working pilots. Id. Indeed, ALPA attached such a high priority to the strike that for over two years it paid extraordinary strike benefits at the rate of $3,800 per month to the striking Captains and $2,400 per month to striking First and Second Officers. Id.

B. Continental Continued To Conduct Pilot System Bids During ALPA's Strike In Order To Staff The Airline

Each commercial airline pilot is required by FAA regulations not only to hold an FAA license, but also to undergo extensive initial training, and periodic re-training, to qualify to occupy a specific position (Captain, First Officer, Second Officer) on a specific aircraft type (DC-9, DC-10, 727, 747, etc.). *See* 14 C.F.R. § 121.433 (1989). Thus, pilots are not interchangeable and extensive pilot training is required as pilots advance to different positions. During ALPA's strike, Continental's ongoing expansion of operations required continuous pilot staffing and training assignments, a function historically served by a system bid. CAL App. at A-7. A system bid is a mechanism to establish a long-term training and assignment plan in which pilots bid for future assignments on the basis of seniority. A system bid serves to identify the right place of each bidding pilot, and determines the amount of training needed to qualify the pilot for his new position or equipment. A system bid was usually published at Continental as much as one year in advance of the final date by which the last pilot assigned by a bid is trained and in his new position. Id. Pilots occupy their new positions one-by-one as they complete the required training. The lengthy phase-in time required

between the award of a system bid and the conclusion of all necessary training is due to the large number of pilots who must be trained to occupy their new positions as well as training facility constraints which limit the number of pilots who can be trained simultaneously.4/ Id. Although a particular pilot may not be trained for some time after a system bid has been awarded, his assignment becomes fixed at the time the bid is awarded because the proper assignment and training schedule for all pilots is interdependent.5/ Id. at A-8.

It was Continental's consistent practice throughout the ALPA strike that striking pilots who made an unconditional offer to return to work were recalled to service in the order in which their offers to return were made, not in seniority order. Id. at A-12. Over 400 striking pilots returned to work in this manner between December 1983 and September 15, 1985. Id. at A-10.

4/ A system bid projects future pilot staffing needs by base of operation (geographic location), equipment (aircraft type), and pilot position (Captain, First Officer, Second Officer). The projections are based upon anticipated aircraft deliveries or dispositions, expected pilot retirement or attrition, and marketing plans for expansion, contraction, or realignment of future flight schedules. Once a system bid is published, each active Continental pilot bids his preferences for base, equipment, and position; the bids are then awarded based on seniority (subject to a number of exceptions not relevant here), assigning each pilot to a specific base, equipment, and position. CAL App. at A-7.

5/ Since ongoing flight operations must be maintained during the training associated with a system bid, the training commences from the bottom, beginning with Second Officers, typically the most junior pilots, who must be released from flight duty in order to be trained to occupy First Officer positions. Then First Officers become available to be trained as Captains. CAL App. at A-8.

On September 9, 1985, Continental posted system bid 1985-5. Id. at A-9. On September 15, 1985, while system bid 85-5 was open for bidding, ALPA informed striking pilots that they could return to work and participate in the bid if they so chose, but that the strike would continue. ALPA publicly described its position as a "strategic maneuver," and explained that "there is something to be said for having your people back on the property. It opens up new possibilities for achieving a solution once you have your foot in the door." CAL App. at A-9. Another ALPA communication stated that "[t]wo hundred reinforcements are on their way in . . . we've got our foot in the door and all we have to do now is kick the damn thing down." Id. Such statements and other information convinced Continental that ALPA was urging the striking pilots to submit bids as a subterfuge; that some or all of the striking pilots who submitted bids did not intend to return to work; and that the award of such bids would disrupt the training process and undermine Continental's ability to staff its future flight schedule. Id. at A-10. Accordingly, Continental refused to accept the bids submitted by the striking pilots and on September 25, 1985, Continental filed suit in federal court seeking an injunction against ALPA's conduct and a declaratory judgment on the invalidity of the challenged bids.6/ CAL App. at A-73. On October

6/ *ALPA v. Continental Airlines, Inc.*, Civil Action No. 85-5203 (S.D. Tex.). Continental's action was filed as a counterclaim in an earlier filed lawsuit by ALPA challenging Continental's withdrawal of its longstanding voluntary recognition of ALPA as the collective bargaining representative of Continental's pilots. Continental withdrew recognition from ALPA as the prospective representative of all Continental pilots after verifying the signatures of over 1400 pilots, a majority of all pilots, who signed a petition seeking ALPA's removal as their bargaining representative.

14, 1985, Continental awarded system bid 85-5 entirely to working pilots (including the pilots who had abandoned the strike before September 15).

C. Continental And ALPA Enter Into A Strike Settlement Agreement

On July 2, 1985, the bankruptcy court had ordered Continental and ALPA to reconvene settlement negotiations in an effort to resolve their differences and thereby expedite a plan of reorganization. In late October 1985, after lengthy and intensive negotiations in which Bankruptcy Judge Roberts served as mediator, the parties reached agreement on a variety of issues including the termination of ALPA's strike, detailed return to work procedures, and the settlement of numerous bankruptcy claims and litigation. At the joint request of ALPA and Continental, on October 31, 1985, Bankruptcy Judge Roberts entered an order and award embodying the terms of the agreement.7/ The settlement was subsequently approved by the bankruptcy court (Wheless,

7/ In its opening brief (at p. 35) to the Fifth Circuit in this case, the O'Neill Group conceded that virtually all of the terms of the settlement were negotiated by Continental and ALPA. *In re Continental Airlines Corp.*, 907 F.2d 1500 (5th Cir. 1990) describes in detail the history of litigation concerning subsequent efforts by the bankruptcy court, at the behest of the O'Neill Group, to modify the terms of the order and award. In affirming approval of the settlement as negotiated, the court found that it "attempt[ed] to satisfy each competing group of pilots by providing an order of recall for the returning strikers, by providing certain assurances as to future captain positions, and by providing certain limited restrictions on the exercise of seniority rights[.]" Id. at 1515. In sum, the court held, in a decision now final, that "the Order and Award is a valid, binding, enforceable settlement agreement." Id. at 1522-23.

J.) following notice and hearing pursuant to Bankruptcy Rule 9019.

The settlement was complex. Sections I and II (i) provided for the termination of ALPA's strike, (ii) prohibited Continental from retaliating in any manner against any former striker for any legally protected strike activity and prohibited ALPA from retaliating against pilots who worked during the strike, (iii) gave pilots terminated during the strike the right to arbitrate such termination, (iv) created detailed procedures for the return of striking pilots to work at Continental (including special protection against failure of medical or training requirements), (v) gave pilots who did not wish to return to work the option of resigning and receiving a generous severance payment, (vi) gave returning strikers almost half of the 85-5 bid captain position, and guarantees of further captain positions on a specified timetable; and (vii) established certain transition rules which allocated captain vacancies on a formula basis between working pilots and returning strikers.8/ The settlement expressly provided that "[s]triking pilots who elect recall will accrue seniority for all purposes during period of the strike and while awaiting recall[.]" ALPA App. at § I.B.9. Likewise, the settlement provided that in the event of a furlough, striking pilots previously recalled would have the full use of their accrued seniority, *i.e.*, working pilots

8/ The agreement allocated the first 100 captain positions in bid 85-5 to working pilots. The remaining 70 captain positions were allocated to returning full-term strikers. Thereafter, until October 1, 1988, subsequent captain vacancies would be allocated between working pilots and former full-term strikers on a one-to-one ratio. ALPA App. at § I.B.2(c)(ii).

with less seniority would be furloughed before more senior striking pilots. Id. at § I.B.2(d).

The settlement offered eligible striking pilots three options.9/ First, pilots could elect recall in seniority order in exchange for a waiver of certain claims against Continental ("Option 1"). Three hundred and twenty-five striking pilots elected Option 1. Second, striking pilots were given the option of terminating their employment and receiving special severance pay in exchange for a waiver of claims ("Option 2"). The 366 pilots who elected Option 2 received a total of $17.3 million, an average of over $47,000 per pilot; twenty pilots received over $100,000.10/ CAL App. at A-14. Third, striking pilots could elect to retain their individual claims and return to work in the order in which they made an unconditional offer to return ("Option 3").

The remainder of the settlement provided for the resolution of bankruptcy claims and the settlement of numerous pending lawsuits, and provided a procedure for resolution by the bankruptcy court of any disputes

9/ The settlement agreement defined eligible striking pilots as "[a]ll pilots on the July 31, 1983 seniority list who are not currently active or on authorized leave and who have not resigned, retired, or been terminated for cause." ALPA App. at § I.B.1.

10/ Contrary to the Fifth Circuits misreading of the settlement, Continental's exposure on the severance option was not capped at $2.6 million. See 886 F.2d at 1442. The cap applied only to a small sub-group of pilots, i.e., those pilots "who were not drawing ALPA strike benefits as of September 15, 1985 and were not on furlough status as of September 24, 1983[.]" CAL App at A-15; ALPA App. at § II. A.2. Indeed, based upon the $17.3 million paid out to the 366 pilots who in fact elected Option 2, Continental's exposure if all eligible pilots had elected severance would likely have exceeded $30-40 million.

concerning the interpretation or application of the agreement.

Three hundred forty nine pilots returned to work at Continental under the settlement (261 under Option 1 and 88 under Option 3). Id. at A-2. Those pilots have exercised their full seniority for all purposes other than bidding of their initial Captain position and have exercised their full seniority for that purpose also at least since the Fall of 1987;11/ 320 of these pilots had been advanced into or awarded Captain positions by October 1988. Id. (The remaining pilots either voluntarily elected to bid for lower status positions or did not have sufficient system seniority to hold a captain position of their choice, independent of the settlement.) Id.

SUMMARY OF ARGUMENT

The peaceful settlement of a labor dispute inherently requires compromise and the exercise of judgment as to the aggregate value of what is being given up as compared to what is being obtained in return. The duty of fair representation, as it has been developed by this Court, has recognized this necessity by according unions a "wide range of reasonableness" in exercising that judgment. The Fifth Circuit's decision in this case, in contrast, deprives unions of the necessary discretion by reviewing a complex settlement on a piecemeal basis, second guessing a union's assessment of legal issues and by permitting a jury to second guess a union's judgment

11/ Thus, at all times these returned pilots exercised their full seniority for such purposes as bidding monthly work schedules, bidding for vacation preference, and for all other purposes. CAL App. at A-2.

both as to the strength of its negotiating position, and as to the value of the trade-offs obtained in a settlement. The bargaining process will be substantially disserved if a union is at risk that a court or jury may subsequently disagree with its assessment of factual and legal issues at the time or with the merits of the ultimate agreement; employers will stand firm rather than compromise if they doubt the ability of the union to adhere to the compromise.

Measured against the proper standard, the strike settlement at issue in this case does not, as a matter of law, give rise to an inference that ALPA acted arbitrarily or irrationally in this agreeing to its terms. The Fifth Circuit's characterizations of the strength of ALPA's legal positions, and its speculation as to what Continental might have done in the absence of the settlement, are ex post facto determinations which ignore the factual and legal uncertainties which confronted ALPA at the time of the settlement. The Fifth Circuit has, in effect, reviewed the settlement de novo rather than simply reviewing whether, on the basis of the facts and the law as they were known to ALPA at the time, the settlement was within the "wide range of reasonableness" accorded to ALPA. Viewed as a whole, as the proper standard requires, the settlement obtained substantial benefits for the strikers, including over $17 million in severance pay, the right to return to work in seniority order, and the right to approximately half of the Captain vacancies on bid 85-5 -- none of which would have been available but for the settlement. As a matter of law, neither a Court nor a jury should be permitted to second-guess ALPA's judgment that the compromise was appropriate and that the substantial collective benefits that the settlement

obtained for the strikers justified the relinquishment of whatever tenuous claims they might have had to other benefits.

ARGUMENT

I. The Strong Public Interest In Stable Labor-Management Relations Requires That Negotiated Settlements Of Labor Disputes Not Be Subject To Second-Guessing By Dissatisfied Union Members

A. A Strict Standard For Evaluating A Union's Duty Of Fair Representation Would Cripple A Union's Ability To Reach Agreements

This Court has long recognized that a union's duty of fair representation does not require the complete satisfaction of every affected employee and that the diversity of employee interests and opinions, and the constraints imposed by often competing economic demands, may require a union to make choices and compromises which are not equally valued among its members. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976); *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Although the words used to describe the duty have varied,12/ the standard for evaluating union compliance with the duty of fair representation has accorded

12/ *Compare Huffman*, 345 U.S. at 338 (statutory representative must be allowed a wide range of reasonableness in bargaining, "subject always to complete good faith and honesty of purpose in the exercise of its discretion"), *with Vaca v. Sipes*, 386 U.S. 171, 190 (1971) ("A breach of the statutory duty of fair representation occurs only when a union's conduct . . . is arbitrary, discriminatory, or in bad faith.").

substantial deference to unions' exercise of judgment in the context of both contract administration13/ and contract negotiation.14/

Because of the significant differences in a union's role in contract administration and contract negotiation, some courts have read this Court's decisions as creating different standards for determining whether a union has satisfied its duty in the two contexts. The existence of a different standard is usually said to arise from the different words this Court used to describe the standard in *Huffman*, a contract negotiation case, than in *Vaca v. Sipes*, 386 U.S. 171 (1971), a contract administration case. *See, e.g., Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 918 (7th Cir. 1989).

Whether the standard for evaluating the duty of fair representation varies depending upon the nature of the action taken, or remains the same but has sufficient flexibility to take into account the context in which the action was taken, a "wide range of reasonableness" is essential if a union is to be an effective representative of the interests of all members of the craft or bargaining unit. Unless unions are accorded some degree of deference in exercising their judgment, the collective bargaining process will be undermined as unions are paralyzed by the inability to reach the compromises

13/ *E.g., United Steelworkers of America v. Rawson*, 110 S.Ct. 1904, 1912 (1990); *Peterson v. Kennedy*, 771 F.2d 1244, 1254-55 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

14/ *E.g., Huffman*, 345 U.S. at 338; *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 918-19 (7th Cir. 1989); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-20 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989).

necessary to reach agreements.15/ Fearing suit by disgruntled members and second-guessing by a jury,16/ unions would be reluctant to "make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." *Huffman*, 345 U.S. at 338. Similarly, employers could never be sure that unions' actions were final and binding, but rather will have to be constantly concerned that some sub-group of employees might be able to convince a jury that, from that sub-group's point of view, the agreement was "irrational."17/ As Justice Goldberg explained in a concurring opinion in *Humphrey v. Moore*, 375 U.S. at 358-59:

> [I]n safeguarding the individual against the misconduct of the bargaining agent, we must recognize that the employer's interests are inevitably involved whenever the labor contract is set aside in order to vindicate the individual's right against the union. The employer's interest should not be lightly denied where there are other remedies available to insure that a union will respect the rights of its constituents. Nor should trial-type hearing standards or conceptions of vested contractual rights be applied so as to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life.18/

In sum, however the standard is phrased, it is essential that unions enjoy the discretion necessary to fashion compromises to difficult as well as simple labor disputes. The nebulous standard adopted by the Fifth Circuit places a union at risk of going before a jury to explain and defend each element of a complex compromise. As a practical matter such a risk will make the negotiation of complex labor settlements much more difficult if not impossible.

15/ Federal labor policy favors settlements of labor disputes. That policy is expressly set forth in the Railway Labor Act. 45 U.S.C. § 152, First. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

16/ In *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 110 S.Ct. 1339 (1990), this court held that a claim for backpay arising during out of a violation of the duty of fair representation presents an issue triable by a jury.

17/ Federal labor law and policy extends to negotiated strike settlements which do not create a prospective collective bargaining agreement to govern all terms of employment for the entire craft or bargaining unit. Thus, in *Retail Clerks Int'l v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), this Court confirmed jurisdiction under federal labor law to enforce a strike settlement agreement between an employer and a union that no longer represented a majority of the employees in the bargaining unit. In an unpublished decision to which the O'Neill Group was a party, the Fifth Circuit upheld ALPA's authority to enter into the strike settlement at issue here and confirmed that ALPA did in fact represent the pilots still on strike in the settlement negotiations. *Texas Air Corp. v. O'Neill*, No. 89-2455 (5th Cir. April 13, 1990). CAL App. at A-69. The court went on to hold that "[t]he strike settlement that ended the strike and contained detailed back-to-work provisions clearly resolved a 'major' dispute. In negotiating that settlement, ALPA had the authority to settle all claims arising out of that dispute[.]" Id. at A-71.

18/ *Cf. Bowen v. United States Postal Service*, 459 U.S. 212, 225-26 (1983) (federal labor policy is served by employer's ability to rely on union's authority to settle grievances.)

B. The Fifth Circuit Decision Is Premised On A Standard Of Review That Would Leave Every Negotiated Agreement Open To Second-Guessing

The Fifth Circuit acknowledged that a union's responsibilities in bargaining permit the exercise of judgment within a wide range of reasonableness,19/ and that a violation of the duty of fair representation is not made out merely because the union "improperly balanced the rights and obligations of the various groups it represents."20/ Nonetheless, the Fifth Circuit applied a standard irreconcilable with these premises in concluding that summary judgment had been improperly granted to ALPA. The court summarized its ruling as follows:

> We are persuaded that a jury would be entitled to infer that ALPA was arbitrary in accepting the strike settlement if it finds that the union should have expected much more favorable treatment for the pilots had the pilots simply given up the strike effort and offered to return to work. In other words, a jury might reasonably find the union's conduct irrational or arbitrary if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made.

19/ 886 F.2d at 1444.

20/ Id. (quoting *Freeman v. Grand Int'l Bhd of Locomotive Eng'rs*, 375 F. Supp. 81, 93 (S.D. Ga.), *aff'd*, 493 F.2d 628 (5th Cir. 1974)).

886 F.2d at 1445. This ruling is unobjectionable if understood to mean that any finding of arbitrary conduct (1) must be based on objective facts available to the union at the time of the settlement, (2) require evaluation of the settlement as a whole and its impact upon the affected union members collectively rather than solely upon individuals or sub-groups, and (3) recognizes the propriety of compromise on legal issues in dispute between the parties at the time of settlement. The Fifth Circuit, however, went on to apply its ruling in a manner which demonstrates that the foregoing limitations do not apply.

The Fifth Circuit identified five specific aspects of the settlement that, in its view, a jury could find to be "irrational."

1. "[A] factfinder could infer that ALPA knew that CAL would not have refused to rehire strikers if ALPA had tendered an unconditional offer for the pilots to return to work." 886 F.2d at 1445.

2. "[A] jury could reasonably conclude that if ALPA had unconditionally offered to return the pilots to duty, CAL likely would have returned striking pilots to work according to seniority, and would have permitted strikers to bid for vacancies according to CAL's seniority-based assignment procedures." Id. at 1446

3. "[A] jury [could] accept the pilots' evidence that CAL likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work." Id.

4. "A factfinder could infer that had ALPA unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for these vacancies and also preserve their litigation rights against CAL." Id.

5. "[A] factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation." Id. at 1447.

As framed by the Fifth Circuit, these issues invite jury speculation about what might have been, or what would have happened, as well as ad hoc jury evaluation of the trade-offs made by the union in the settlement. These issues also focus narrowly on specific provisions of a comprehensive agreement and ignore the benefits of other provisions not mentioned by the Fifth Circuit. These issues also turn on ex post facto judicial evaluation of the merits of the union's position on pending legal issues rather than on the "wide range of reasonableness" in compromising disputed positions.

The analytical approach adopted by the Fifth Circuit is unworkable for several reasons. First, it permits a violation to be inferred on the basis of an element by element appraisal of the settlement, and its effect on individuals rather than on an evaluation of the settlement as a whole and its effect upon the entire membership. This is directly contrary to substantial precedent that permits a union to trade-off even meritorious positions in

return for other advantages it believes to be of greater collective value.21/ Second, it permits the factfinder to speculate with the benefit of hindsight and to substitute its judgment for that of the union in trying to determine what the employer "would have done" or what the union "should have expected." Third, it permits an ex post facto evaluation of the merits of a union's position on disputed legal issues and finds the union culpable for compromise if its position is later viewed by the court -- or perhaps the jury -- as more likely to have prevailed. Such a blatant opportunity for second-guessing will render most unions incapable of action. As discussed below, viewed in the context in which it was reached and taken as a whole, the settlement constituted a rational, workable resolution of a difficult labor dispute.

II. The Settlement At Issue Here Fell Well Within The Range Of Reasonableness Accorded Negotiated Agreements

A. The Provisions Of The Settlement Constituted A Rational Evaluation Of The Strength Of ALPA's Legal Position

The primary basis for the Fifth Circuit's remand on the duty of fair representation claim is the court's view that

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21/ *See, e.g., Breininger v. Sheet Metal Workers Int'l Ass'n*, 110 S. Ct. 424, 431 (1989)("Most fair representation cases require great sensitivity to the tradeoffs between an interest of the bargaining unit as a whole and the rights of individuals."); *Johnson v. Air Line Pilots*, 650 F.2d 133, 137 (8th Cir.), *cert. denied*, 454 U.S. 1063 (1981); *Buchholtz v. Swift & Co.*, 609 F.2d 317, 327 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980); *Local 13, Int'l Longshoremen's and Warehousemen's Union v. Pacific Maritime Ass'n.*, 441 F.2d 1061, 1067 (9th Cir. 197), *cert. denied*, 404 U.S. 1016 (1972).

a jury could find that the order and award "left the the striking pilots worse off in a number of respects than complete surrender to CAL." 886 F.2d at 1445. The undisputed facts, however, reveal that ALPA had good reason to doubt that it could prevail on any of the factual or legal issues cited by the court.

1. ***Strikers Had No Legal Right Or Factual Expectation To Return To Work In Seniority Order.*** The Fifth Circuit apparently concluded that as a result of the settlement striking pilots lost the right to return to work in seniority order. However, the law is well established that an employer can return strikers to work in any nondiscriminatory manner it desires, and is not required to return strikers to work in seniority order. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 347 (1938); *NLRB v. American Olean Tile Co.*, 826 F.2d 1496, 1499 (6th Cir. 1987); *Lone Star Indus.*, 279 N.L.R.B. No. 78 (1986), *aff'd in relevant part sub nom. Teamsters v. NLRB*, 813 F.2d 472 (D.C. Cir. 1987). Indeed, throughout the ALPA strike, striking pilots who made an unconditional offer to return to work were recalled, if vacancies were available, in the order in which their offers to return were received by Continental. CAL App. at A-12. The settlement agreement continued this consistent practice for those pilots who desired to return to work but elected not to settle their claims (Option 3 pilots). Id. Accordingly, contrary to the Fifth Circuit's assumption, the returning strikers had no absolute right to return to work in seniority order upon an unconditional offer to return.

None of what the Fifth Circuit characterized as "strong summary judgment evidence", 886 F.2d at 1445, supports

its conclusion that Continental would have returned the strikers to work in seniority order absent the settlement agreement. The mere fact that prior to the settlement, Continental had applied its standard bidding practices, had honored prestrike seniority, and had recognized seniority accrued during the strike, in *no* respect provides evidence of any right or expectation that striking pilots would return to work in seniority order. The critical relevant and undisputed fact is that prior to the settlement no striking pilot had returned in seniority order; under the settlement they had that option.22/

2. ***Strikers' Legal Rights To Participate In Bid 85-5 Were In Dispute.*** A second major defect in the Fifth Circuit's opinion is the court's assumption that, as a matter of law, the returning full-term strikers had the absolute right to bid on all vacancies in bid 85-5. On September 15, 1985, while bid 85-5 was pending, ALPA informed the striking pilots that if they desired to return to work and participate in the bid they could do so without threat of union discipline or harassment, but emphasized that the strike would continue. ALPA issued a press release announcing that this new tactic was a "strategic maneuver." CAL App. at A-9. Continental became aware of statements by ALPA indicating that the returning strikers would act as a "Trojan Horse,"

22/ The only other summary judgment evidence referred to by the Fifth Circuit was an alleged discussion in September 1985 between ALPA and Continental in which "Continental indicated that it would honor an unconditional return and recall strikers in seniority order according to their bids." 886 F.2d at 1445 n.3. Because much of the record was sealed by the district court, Continental is unaware of the evidence referred to by the Fifth Circuit. In any event, Continental made no such offer or statement. CAL App. at A-13.

positioning them for future slowdowns, sick-outs and other disruptive tactics. Continental also received reports that strikers were being told to offer to return and submit bids, whether or not they actually intended to abandon the strike and report for training as scheduled, thereby severely disrupting Continental's pilot training program and its ability to staff its future flight schedule. Id. These statements and reports gave Continental cause to question the bona fide nature of the bids and unconditional offers submitted by individual pilots between September 15 and 18, 1985. As a result, Continental rejected those offers and bids and filed suit in federal court challenging the legality of ALPA's entire course of conduct. CAL App. at A-73. *See Johns-Manville Prods. Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), *cert. denied sub nom. Oil, Chem. & Atomic Workers Int'l Union v. Johns-Manville Prods. Corp.*, 436 U.S. 956 (1978) (where safety and integrity of operations may be affected by an in-plant strike or misconduct and the identity of wrongdoers is not feasible, an employer is justified in locking out all employees).

The Fifth Circuit ignored extensive case law,23/ including its own prior ruling in a Railway Labor Act case, that a vacancy may be "filled" by a replacement to whom the position had been committed and therefore not be available to a returning striker, even though the

23/ *See H & F Binch Co. v. NLRB*, 456 F.2d 357, 362 (2d Cir. 1972); *IAM v. International Aircraft Services, Inc.*, 302 F.2d 808, 812 (4th Cir. 1962); *NLRB v. Cutting, Inc.*, 701 F.2d 659, 662 (7th Cir. 1983), *Home Insulation Service*, 255 N.L.R.B. 311, 312 n.9, *enf'd without opinion*, 665 F.2d 352 (5th Cir. 1981). *See also Superior Nat'l Bank & Trust Co.*, 246 N.L.R.B. 721 (1979); *Southwest Engraving Co.*, 198 N.L.R.B. 694 (1972); *Anderson, Clayton & Co.*, 120 N.L.R.B. 1208 (1958).

replacement had not yet occupied the position. *National Airlines, Inc. v. IAM*, 430 F.2d 957, 961 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).24/ According to the Fifth Circuit, the strikers' right to positions awarded to working pilots in bid 85-5 flowed from the decision in *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).25/ *United*, however, is not on point. In that case, the Seventh Circuit found that certain new hire pilots were not "employees" as that term is defined by the RLA because they had never performed any work for the carrier, a fact that the Seventh Circuit found dispositive of their status. Here, in stark contrast, pilots awarded positions under bid 85-5 had been working for Continental during

24/ Continental's long standing practice and policy, dating from prior to the strike, was that a vacancy was filled as soon as a pilot has been awarded it, even if the pilot is not trained for and advanced into the position until months later. A major reason for this policy is the "domino" or "ripple" effect which would be created if assignments were changed once the training cycle has commenced; training which had been done by that time could be wasted, and the scheduling of further training delayed, by the secondary reassignment of all affected pilots to a new "rightful place" on the bid assignments. CAL App. at A-11.

25/ The Fifth Circuit also cited *Independent Fed'n of Flight Attendants v. Trans World Airlines Inc.*, 819 F.2d 839 (8th Cir. 1987), *rev'd on other ground*, 489 U.S. 426 (1989), as support for its position. The Eighth Circuit, however, merely adopted the reasoning of the Seventh Circuit in *United Air Lines* and adds nothing to the Fifth Circuit's analysis. This Court's subsequent decision in *TWA* undermined the Eighth Circuit's rationale and refused to adopt that court's "expansive" reading of *Erie Resistor*. While the status of trainees who have never performed any revenue service is not at issue in this case, Continental notes that the Fifth Circuit's reliance upon *United* and *TWA* ignores both the logic and the controlling effect of *National Airlines*, which focused upon the need of both employer's and employees to rely upon commitments of employment.

the strike and it is undisputed that they were employees for purposes of the RLA. Thus, contrary to the Fifth Circuit's assumption, ALPA had not previously prevailed on the issue of whether the returning full-term strikers had any right to bid on the vacancies in bid 85-5 which had already been awarded to working pilots at the time the settlement was reached.26/

3. ***The Negotiated Transition Provisions Allocating Captain Positions Did Not Create A Permanent Cleavage.*** Section I.B.2(c) of the settlement, labelled "Allocations of Vacancies: Transitional Provisions," establishes a formula for allocation of captain positions between working pilots and returning strikers, until the last returning striker was awarded a Captain vacancy -- an event which occurred in 1988. The Fifth Circuit, *citing NLRB v. Erie Resistor*, 373 U.S. 221 (1963), concluded that a factfinder "might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation." 886 F.2d at 1447.27/

26/ There is no suggestion in the Fifth Circuit's opinion that Continental's 85-5 bid was somehow infirm. Given the total absence of any record evidence that the bid was motivated in any part by an improper purpose, there was no basis for any such funding. *See United Air Lines*, 802 F.2d at 899-900. To the contrary, and as ALPA admitted in its petition for writ of certiorari, "[i]t is undisputed that the 85-5 bid was an operational effort by Continental to fill vacancies, in the ordinary course of business under work rules that continued during the strike." Pet. at 25.

27/ In *Erie Resistor*, the employer awarded new hires and crossovers 20 years of "super-seniority." The Court held that such conduct "creates a cleavage . . . continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and tho-

(continued...)

In order to reach a settlement, Continental and ALPA agreed to share the Captain vacancies between "working pilots" and "striking pilots" for a limited period on a negotiated formula basis. The compromise also included a fixed timetable for the advancement of returning pilots to Captain positions, including pay guarantees in the event the timetable could not be met.28/ It was, as the court describe it, a "dovetailing" of the two groups of pilots, but only for purposes of allocating Captain vacancies;29/ in all other respects all pilots exercised their full seniority, thereby entitling more senior returned pilots to their preferences as to monthly work schedules, vacations and similar matters. Striking pilots who returned to work have retained their full seniority relative to crossover pilots and are senior to all pilots hired as permanent replacements.

27/ (...continued)
se who returned before the end of the strike and thereby gained extra seniority. This . . . stands as an ever present reminder of the dangers connected with striking and with union activities in general." 373 U.S. at 230.

28/ The settlement guaranteed returning strikers 185 Captain vacancies by October 1988. In fact, all returning strikers who desired Captain positions (over 320 pilots in total) were awarded Captain vacancies on the 1987-3 bid awarded in the Fall of 1987, prior to submission of the O'Neill Group's briefs in its appeal to the Fifth Circuit. Thus, the depiction of a permanent cleavage between working and striking pilots in the O'Neill Group's briefs was inaccurate.

29/ This allocation method was modeled on an arrangement common in airline mergers, and had previously been used in the 1983 pilot seniority integration following the merger of Texas International Airlines into Continental (which was conducted pursuant to ALPA's published Merger Policy in effect at the time). CAL App. at A-8.

This settlement simply did not create a permanent cleavage in the pilot workforce. By 1987, after all returning pilots had been awarded captain vacancies, thereby concluding the applicability of the settlement's transitional provisions allocating captain vacancies, it was impossible to look at any Continental pilot and determine whether such pilot was a striker or a non-striker. Nor did this compromise prejudice vested seniority rights. To the extent that the settlement's transition provisions did modify Continental's prior procedures in awarding captain vacancies, such a provision was well within the rights of Continental and ALPA to include with a strike settlement agreement. *See, e.g., Gem City Ready Mix Co. & Jack Roberts*, 270 N.L.R.B. 1260 (1984).30/ *Cf. Haas v. Darigold Dairy*

30/ In *Gem City*, the Board upheld a union's acceptance of a strike settlement agreement allowing three employees who worked during the agreement to be placed on the top of the seniority list, thereby leapfrogging employees who struck.

> The policy of the National Labor Relations Act is to encourage the practice and procedure of collective bargaining as a means of resolving labor disputes, including the encouragement of the negotiation of strike settlement agreements. In furtherance of this public policy, the Board long has recognized that statutory rights, including even the fundamental right to strike can be waived . . . it is clear that the Union, with the subsequent concurrence of its membership, waived full prestrike seniority on behalf of returning strikers in return for an opportunity to end the strike and return to work. Under these circumstances, it was satisfactory demonstrated that awarding top seniority to the two nonstriking employees and the strike replacement was [] lawful[.]

270 N.L.R.B. at 1261; *see also Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) (a union and employer may agree to contractual provisions (continued...)

Prod. Co., 751 F.2d 1096, 1099 (9th Cir. 1985) ("Employee seniority rights are not 'vested' property rights which lie beyond the result of subsequent union--employer negotiations."); *Cooper v. General Motors Corp.*, 651 F.2d 249, 250-51 (5th Cir. 1981)(same); *Wheeler v. Brotherhood of Locomotive Firemen & Engineermen*, 324 F. Supp. 818, 824 (D.S.C. 1971) (seniority rights may be waived by a union); *Flight Eng'ns Int'l Ass'n v. Eastern Air Lines, Inc.*, 243 F. Supp. 701, 708 (S.D.N.Y. 1965), *aff'd*, 359 F.2d 330 (2d Cir. 1966). In sum, *Erie Resistor* is inapposite in the circumstances here and the Fifth Circuit's reliance on that decision was misplaced.

4. ***Continental Did Not Assign The Rank Of A Returning Striker.*** The Fifth Circuit also erroneously found that, under the settlement agreement, Continental assigned returning full-term strikers to its choice of rank. 886 F.2d at 1441. This is simply not the case. Analysis of the rejected "Trojan Horse" bids of strikers had showed a concentration of returning strikers in certain bases. Because of Continental's concern about work slowdowns and other disruptions that it feared might result if returning full-term strikers were concentrated in a particular pilot base, Continental negotiated the one-time right to assign each returning striker to his or her initial base and equipment. CAL App. at A-14. In contrast, the rank (and pay) of a returning striker was

30/ (...continued)
waiving statutory rights). Of course, as discussed, since the settlement here provided that returning strikers would accrue seniority during the strike and while awaiting recall, it was far less onerous to strikers than the strike settlement approved by the NLRB in *Gem City*, which continues to be cited by the NLRB with approval. *See Prentice-Hall, Inc.* 290 N.L.R.B. No. 79 at 65 (1984); *Pioneer Holding Co.*, 291 N.L.R.B. No. 147 at 28-29 (1985).

determined objectively on the basis of available vacancies and on the striker's place in the order of returning strikers. Thus, contrary to the Fifth Circuit's finding, Continental did not have the right to determine the rank of a striker upon his return to work.

5. ***Strikers Were Not Required to Waive Wage Claims.*** The Fifth Circuit also erroneously found that the settlement agreement required returning pilots who elected Option 1 to waive all claims against Continental including "claims in bankruptcy for unpaid wages." 886 F.2d at 1441. In fact, under the settlement Continental agreed to pay all pilots 100% of their "hard" claims, which included unpaid pre-bankruptcy wages, medical and dental expenses, other reimbursable expenses, and accrued but unused vacation. No hard claims were waived by any pilot under the order and award. Contrary to the Fifth Circuit's understanding, only "soft" claims, such as claims for contract rejection damages, were waived by certain returning pilots under the settlement agreement. Most of the soft claims filed by pilots had already been denied by the bankruptcy court by the time of the settlement. *See, e.g., In re Continental Airlines Corp*, 901 F.2d 1259 (5th Cir. 1990).

B. The Settlement As A Whole Was Reasonable

By August 1985, ALPA's strike by most measures had failed. Continental had surpassed its pre-strike size, and approximately 1,600 pilots were working, including approximately 400 pilots who had abandoned ALPA's strike and returned to work. ALPA had seen its contract rejected and had been unsuccessful in its litigation against Continental. On the other hand, the pendency of

ALPA's extensive litigation and bankruptcy claims constituted an impediment to Continental's reorganization. Both sides, therefore, had an interest in compromise. Both elected the certainty of settlement, with its hope of future growth for Continental and more jobs for pilots.

Through the settlement ALPA successfully obtained significant benefits for the striking pilots. Perhaps most important, for those pilots who desired to return to work, the settlement agreement provided the option of returning to work in seniority order and made available nearly half the captain vacancies in bid 85-5. The remaining striking pilots were recalled to available first and second officer positions, with a fixed timetable for the advancement of additional returning pilots to captain positions, including pay guarantees in the event the timetable could not be met. The settlement also provided special protection for returning strikers who failed their medical clearance tests or flight training requirements. In addition, the settlement provided that over $17 million in severance payments were distributed to pilots who did not wish to return to work, and further provided for the final distribution of pension funds. Finally, the settlement provided for the allowance of "hard" bankruptcy claims and for the establishment of an arbitration mechanism for pilots who wanted to challenge their terminations. Without the settlement agreement none of these substantial benefit would have been available to the returning strikers. Thus, viewed as a whole, the settlement was clearly reasonable.

CONCLUSION

For the forgoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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